

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MICHAEL KELLEY,

Defendant-Appellant.

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UNPUBLISHED

April 28, 2009

No. 276269

St. Clair Circuit Court

LC No. 06-000982-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a weapon with unlawful intent, MCL 750.226, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced to 1½ to ten years' imprisonment for the assault offense, 1½ to five years' imprisonment for carrying a weapon with unlawful intent, and 90 days in jail for possession of marijuana. We affirm.

Defendant's initial claim on appeal is that there was insufficient evidence to sustain the jury's verdict.<sup>1</sup> Defendant was accused of assaulting Timothy Vandewalle with a baseball bat in the driveway of the Vandewalle home while an unidentified woman was assaulting Timothy's wife Christine Vandewalle. Defendant's argument is based on three assertions that will be considered in turn. First, defendant argues that the jury should not have convicted him because the testimony of the prosecution's witnesses was inconsistent and inherently incredible. This is, in effect, a "great weight of the evidence" argument. In order to find that a jury's verdict is against the great weight of the evidence, this Court must determine that "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), quoting *State v Ladabouche*, 146 Vt 279, 285; 502 A2d 852 (1985); see also *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003) ("The test . . . is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to

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<sup>1</sup> Defendant makes no specific claim, however, that there was insufficient evidence to support his conviction for marijuana possession.

stand.”). “[A]bsent exceptional circumstances, issues of witness credibility are for the jury . . . .” *Lemmon*, *supra* at 642.

Defendant seeks to show unreliability in the testimony of the prosecution’s witnesses primarily by comparing the testimony of the various witnesses and pointing out inconsistencies between trial testimony and preliminary examination testimony or statements made to the police. The types of inconsistencies identified by defendant (some of minor relevance, such as whether the car at the scene of the assault was green, “greenish,” or teal green and whether Timothy fought, wrestled, held, or scuffled with his assailant) are exactly what are regularly revealed whenever multiple witnesses testify and prior statements are compared with trial testimony. Such inconsistencies are routinely used by trial counsel to cast doubt on a witness’s trial testimony, as defense counsel did here. It was for the jury to decide the value of this impeachment, and the credibility and weight of the witnesses’ testimony. *Id.* at 642, 646-647. Based on our review of the record evidence, defendant has failed to establish “that an innocent person [was] found guilty, or that the evidence preponderates heavily against the verdict so that it would be a serious miscarriage of justice to permit the verdict to stand.” *Id.* at 647.

Second, defendant makes a more straightforward “insufficiency of the evidence” claim. Defendant asserts that the evidence was insufficient to establish his identity as the assailant. Specifically, defendant argues that there were reasonable explanations for the presence of his workplace timecard near the Vandewalles’ driveway, and that a comparison of the testimony of the prosecution’s witnesses concerning the time the assault must have occurred and defendant and his witnesses concerning his whereabouts at that time, established that he could not have committed the assault. We review the evidence *de novo*, viewing it in the light most favorable to the prosecution, in order to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant’s argument is meritless because it considers the evidence in the light most favorable to him. Reviewing the evidence in the light most favorable to the prosecution supports the jury’s conclusion that defendant was the man who assaulted Timothy. The Vandewalles gave a description of the man who committed the assault that basically matched defendant’s appearance. Defendant can be circumstantially linked to the scene of the crime by the fact that his workplace timecard was found there. Defendant’s car was identified as the car the assailants used to follow the Vandewalles to their home and flee the scene after the assault was committed. Defendant admitted he was a close associate of the man allegedly behind the assault, Marshall Coleman.<sup>2</sup> Finally, defendant initially lied to the police by claiming that his girlfriend was with him at the time of the assault. This evidence was sufficient to prove defendant’s guilt beyond a reasonable doubt.

Third, defendant claims that the prosecution failed to use due diligence to locate and produce two witnesses he characterizes as “essential,” Coleman and Coleman’s brother Delvin

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<sup>2</sup> Coleman had sold a car to Christine a year earlier and was allegedly threatening her regarding completion of payment.

Harper. Defendant did not object below to the non-production of the witnesses, or argue that the prosecution failed to use due diligence in attempting to locate or produce them. Because the claim was not preserved, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The prosecution's responsibility to locate or produce Coleman and Harper is dependent on MCL 767.40a, which provides, in part:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

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(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

Pursuant to MCL 767.40a(1), a prosecutor must list the names of known res gestae witnesses with the information. The purpose of this requirement is merely to notify the defendant of the witness's existence and res gestae status. *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). A res gestae witness is "an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hadley*, 67 Mich App 688, 690; 242 NW2d 32 (1976). If a prosecutor endorses a witness, he must use due diligence to produce that witness at trial regardless whether the endorsement was required. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Here, defendant has failed to establish that either Coleman or Harper was a res gestae witness. There is no evidence that either man was present at the scene of the assault and observed the assault, or that their testimony, if they were willing to give it, would aid in developing a full disclosure of the facts surrounding the

commission of the charged offenses.<sup>3</sup> Therefore, the prosecution had no duty to list or produce these men. Nor did the prosecution have any duty to assist defendant in locating or serving them. Defendant requested no such assistance. See MCL 767.40a(5). Moreover, even if Coleman and Harper were *res gestae* witnesses, defendant cannot establish that he was prejudiced in any way by the prosecution's failure to list or produce them considering that defendant was fully aware of their existence. *Gadomski, supra* at 36.

Defendant also argues that, in effect, the police failed to conduct a thorough enough investigation because they failed to arrest Coleman for allegedly attempting to run the Vandewalles off the road in an unrelated incident, or at least question Coleman and Harper about their alleged involvement in events leading up to the assault. While an investigating officer's lack of due diligence or reasonable effort in identifying witnesses is imputed to the prosecution, *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990), defendant has not established that Detective Loxton's attempts to contact Coleman were less than reasonable or that he was prejudiced in any way by the prosecution's failure to list or further investigate Coleman and Harper. Defendant has failed to demonstrate plain error that affected his substantial rights. *Carines, supra* at 763.

In his second appellate issue, defendant claims his trial counsel was ineffective for failing to request the assistance of the prosecution in locating and producing witnesses, object to the prosecution's lack of due diligence, and request a "missing witness" instruction. "[T]o prove a claim of ineffective assistance of counsel mandating reversal of a conviction the Sixth Amendment requires not only that counsel's performance fell below an objective standard of reasonableness, but also that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of the *Strickland* test mandates a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra* at 687. Defendant must overcome a strong presumption that the defense was not part of a sound trial strategy. *Id.* at 689. The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. *Id.* at 687. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland, supra* at 694.

As noted, the prosecution did not list Coleman or Harper on its pretrial witness lists and defendant never requested assistance in locating or serving them as required by MCL 767a(5). "Neither the prosecution nor the defense has an affirmative duty to search for evidence to aid the other's case." *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). Therefore, the prosecution was not required to exercise due diligence to locate or produce these men and an objection to the failure to exercise due diligence would have been meritless. Defense counsel

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<sup>3</sup> Detective Duane Loxton testified that he attempted to contact Coleman, but Coleman would not speak with him.

was not ineffective for failing to make a meritless objection. See *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008).

Because the prosecution did not have the duty to list, locate, or produce Coleman and Harper, we must consider whether defense counsel chose not to seek production of these two men as part of his trial strategy. Defendant has not overcome the strong presumption that defense counsel's decision was a matter of trial strategy. *Strickland, supra* at 689; *Carbin, supra* at 600. Defense counsel used the absence of Coleman at trial to suggest to the jury during closing argument that the police had conducted a shoddy investigation. Moreover, defendant does not provide any evidence that either Coleman or Harper would have testified and, if they had, that their testimony would have aided his case. Accordingly, defense counsel's performance did not fall "outside the wide range of professionally competent assistance." *Strickland, supra* at 690.

As for a missing witness instruction, such an instruction can only be used when a prosecutor has a duty to produce a witness. *People v Perez*, 469 Mich 415, 418-420; 670 NW2d 655 (2003). As indicated, the prosecution had no duty to list, locate, or produce Coleman and Harper, and defendant did not request law enforcement assistance in locating these men. MCL 767.40a. Thus, there was no basis for requesting the missing witness instruction, *Perez, supra*, and defense counsel was not ineffective for failing to do so, *Unger, supra*.

Affirmed.

/s/ Jane M. Beckering  
/s/ Michael J. Talbot  
/s/ Pat M. Donofrio